

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

WILLIAM R. VILTZ,

Petitioner,

v.

L. S. MCEWEN, Warden,

Respondent.

Civil No. 12-CV-1494-MMA(BLM)

**ORDER ADOPTING IN PART REPORT
AND RECOMMENDATION; DENYING
MOTION TO STAY**

[Doc. Nos. 3 & 20]

Presently before the Court is Petitioner William R. Viltz's ("Petitioner") motion for stay and abeyance. [Doc. No. 3.] Petitioner filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on June 18, 2012, [Doc. No. 1], and filed a First Amended Petition on August 15, 2012, [Doc. No. 8]. In Petitioner's motion for stay and abeyance he requests the Court stay further proceedings on his Petition in order to exhaust claim one, in which he asserts that his constitutional right to a fair trial was violated by the trial court's failure to instruct the jury as to the lesser included offense of attempted rape and that his "conviction was based on a set of facts different from the preliminary hearing . . . [and] on unspecified acts which could each constitute the count charged." (Pet. at 4 [Doc. No. 8]; Appendix 1 at 2 [Doc. No. 8-1]; Pet.'s Mot. at 2 [Doc. No. 3].)

The Court referred the matter to Magistrate Judge Barbara L. Major, who issued a Report and Recommendation ("R&R") recommending that Petitioner's motion for stay and abeyance be granted. [Doc. No. 20.] The R&R concludes that Petitioner has not shown good cause

1 under *Rhines v. Weber*, 544 U.S. 269, 278 (2005) for a stay to issue, but that Petitioner has
 2 sufficiently met the standard under *Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2003), to grant a
 3 stay of the action. [*Id.* at 6, 10.] On January 2, 2013, Petitioner filed a document titled “Request
 4 to Dismiss Request for Stay & Abeyance,” filed as an Objection to the R&R, which states that
 5 his formerly unexhausted claim has now been exhausted with the California Supreme Court, and
 6 therefore, he requests the Court dismiss his Motion to Stay. [Doc. No. 21.]

7 **DISCUSSION**

8 Having reviewed Petitioner’s motion, Respondent L.S. McEwen’s response [Doc. No.
 9 16], and the R&R, the Court hereby approves and **ADOPTS IN PART and DECLINES TO**
 10 **ADOPT IN PART** the R&R. *See* 28 U.S.C. § 636(b)(1) as indicated below.

11 To the extent the R&R finds that Petitioner has failed to satisfy the requirement that he
 12 show good cause under *Rhines*, but that issuance of a stay is appropriate under *Kelly*, the Court
 13 **ADOPTS** the R&R. Under *Rhines*, a district court has discretion to stay a mixed petition to
 14 allow a petitioner time to return to state court to present unexhausted claims. *Rhines*, 544 U.S.
 15 at 276. The stay and abeyance procedure is available only in limited circumstances, and only
 16 when: (1) there is “good cause” for the failure to exhaust; (2) the unexhausted claims are
 17 potentially meritorious; and (3) the petitioner did not intentionally engage in dilatory tactics. *Id.*
 18 at 277-78. As Magistrate Judge Major noted, Petitioner here has not established the good cause
 19 necessary for a stay because he has not explained why he did not present the claims earlier.
 20 (R&R at 6.)

21 In contrast, an abeyance under *Kelly* requires compliance with a three-step procedure, as
 22 follows: (1) the petitioner must file an amended petition with only his exhausted claims, deleting
 23 his unexhausted claims; (2) the district court “stays and holds in abeyance the amended, fully
 24 exhausted petition, allowing petitioner the opportunity to proceed to state court to exhaust the
 25 deleted claims”; and (3) after conclusion of state court exhaustion proceedings, petitioner must
 26 seek to amend the federal petition to reattach “the newly exhausted claims to the original
 27 petition.” *King v. Ryan*, 564 F.3d 1133, 1135 (9th Cir. 2009). However, the petitioner is only
 28 allowed to add the fully exhausted claims back to the federal petition if the claims are timely

1 under AEDPA or “relate back” to the exhausted claims in the petition. *Id.* at 1140-41, *see also*
 2 *Mayle v. Felix*, 545 U.S. 644, 662-64 (2005). A new claim does not “relate back” to an
 3 existing claim simply because it arises from “the same trial, conviction or sentence.” *Id.* at 1141.
 4 If the newly-exhausted claim is not timely under AEDPA or the relation-back doctrine, it may
 5 not be added to the existing petition. *Id.* at 1140.

6 Here, the R&R correctly calculated the start of the statute of limitations for the Petition,
 7 and determined Petitioner was entitled to sufficient statutory tolling to render his claims timely
 8 for purposes of a stay under *Kelly*. (R&R at 9-10.) Therefore, the Court **ADOPTS** the
 9 reasoning of the R&R to the extent it determines that Petitioner was entitled to a stay pursuant
 10 to *Kelly*. However, in light of the fact that Petitioner has now exhausted his formerly
 11 unexhausted claims, the Court **DECLINES** to adopt the R&R insofar as it held a stay under
 12 *Kelly* should be granted because the request for a stay is now moot.

13 CONCLUSION

14 For the foregoing reasons, the Court **DENIES** Petitioner’s motion for stay and abeyance
 15 as moot.

16 **IT IS SO ORDERED.**

17 DATED: February 13, 2013

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 19 Hon. Michael M. Anello
 United States District Judge
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